

**Letter of Findings: 08-0531
Sales and Use Tax
For the Tax Years 2005-2007**

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Use Tax—Imposition.

Authority: IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-5-18; IC § 6-8.1-5-1; [45 IAC 2.2-5-28](#); [45 IAC 2.2-5-36](#).

Taxpayer protests the imposition of use tax on its purchase of a surgical microscope.

II. Tax Administration—Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana health care provider. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed use tax and assessed a negligence penalty for the tax years 2005, 2006, and 2007. The Department found that Taxpayer had purchased a variety of supplies and capital assets, including a surgical microscope, without paying Indiana sales tax at the time of purchase or remitting use tax to the Department. Taxpayer protested the imposition of the tax on its surgical microscope purchase and the imposition of penalties in general. An administrative hearing was held, and this Letter of Findings results.

I. Use Tax— Imposition.

DISCUSSION

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

The Department found that Taxpayer had purchased a surgical microscope without paying sales tax at the time of purchase, and assessed used tax on the purchase.

IC § 6-2.5-3-2(a) provides, "An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." An exemption from the use tax is granted for transactions where the gross retail tax ("sales tax") was paid at the time of purchase pursuant to IC § 6-2.5-3-4.

Taxpayer asserts that its purchase of the surgical microscope is medical equipment that is exempt from sales and use tax under IC § 6-2.5-5-18. Taxpayer supports its assertion by citing to [45 IAC 2.2-5-28\(g\)](#), which states, "The sale to the user of medical equipment, supplies, or devices prescribed by one licensed to issue such a prescription are exempt from sales and use tax." Taxpayer maintains that since the microscope is used to correct a malfunction of the body and its use is prescribed by one licensed to issue such a prescription, the microscope is exempt under [45 IAC 2.2-5-28\(g\)](#).

However, [45 IAC 2.2-5-28\(h\)](#) states, "The term 'medical equipment, supplies or devices,' as used in this paragraph, are those items, the use of which is directly required to correct or alleviate injury to malfunction of, or removal of a portion of the purchaser's body." (Emphasis Added.) Moreover, the "user," referred to in [45 IAC 2.2-5-28\(g\)](#) is the patient-purchaser. Thus, unless the microscope is sold to a patient under a prescription to correct a malfunction to the patient's body, [45 IAC 2.2-5-28\(g\)](#) does not apply. Here, the transaction in question, the microscope purchase, was not a sale to a "user," but rather a sale to a "practitioner." [45 IAC 2.2-5-36\(a\)](#) states, "The gross retail tax shall apply to the... transactions made by licensed practitioners... [to purchase] surgical instruments, equipment and supplies." Since Taxpayer is a "practitioner" purchasing "surgical equipment" (the microscope), [45 IAC 2.2-5-36\(a\)\(3\)](#) applies signifying that the microscope purchase is subject to sales and use tax.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration—Penalty.

DISCUSSION

The Department issued proposed assessments and ten percent negligence penalties for the tax years in question. Taxpayer protests the imposition of the penalties. The Department refers to IC § 6-8.1-10-2.1(a)(3), which provides "if a person... incurs, upon examination by the department, a deficiency that is due to negligence... the person is subject to a penalty."

The Department refers to [45 IAC 15-11-2\(b\)](#), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or

diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2\(c\)](#), as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

In this case, Taxpayer incurred an assessment which the Department determined was due to negligence under [45 IAC 15-11-2\(b\)](#), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). Taxpayer has argued for a penalty waiver asserting a history of tax compliance. However, the Department finds that Taxpayer did not act with reasonable care and was inattentive to its tax duties. Inattention constitutes negligence and negligence is subject to penalty. Accordingly, Taxpayer has not provided sufficient grounds in its protest to justify the Department's waiver of penalty.

FINDING

Taxpayer's protest is respectfully denied.

CONCLUSION

In summary, Taxpayer's protests of Issues I & II are denied.

Posted: 04/29/2009 by Legislative Services Agency
An [html](#) version of this document.